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PROMOTING ACCOUNTABILITY FOR HUMAN RIGHTS ABUSES

*Jon M. Van Dyke**

The world community has affirmed repeatedly during the past sixty years that the human rights listed in the 1948 Universal Declaration of Human Rights,¹ the 1966 International Covenant on Civil and Political Rights,² and the 1966 International Covenant on Economic, Social, and Cultural Rights³ reflect universal norms of customary international law binding on all nations. These documents also make it clear that, in addition to the right to be free from human rights abuses, individuals have a separate right to compensation if they are subjected to such abuses and to have their abuses investigated and the perpetrators prosecuted and brought to justice. Despite the affirmations, the world community is today still struggling to find a cohesive means of enforcing human rights around the globe. The following materials examine these strategies that have been used to protect the victims and prosecute the wrongdoers, and the challenges that lie ahead.

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¹ G.A. Res. 217 A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948).

² G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

³ G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976.

THE OBLIGATION TO ADDRESS AND RESOLVE HUMAN RIGHTS
ABUSES⁴

Article 8 of the Universal Declaration of Human Rights states that "Everyone has the right to *an effective remedy* by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."⁵ Similarly, Article 2(3)(a) of the International Covenant on Civil and Political Rights, which has been ratified by more than 140 countries, says that "[e]ach State Party to the present Covenant undertakes . . . [t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have *an effective remedy*, notwithstanding that the violation has been committed by persons acting in an official capacity."⁶

Regional human rights treaties also emphasize the right to redress for human rights violations. Article 6(1) of the European Convention on Human Rights says that "[i]n the determination of his civil rights . . . everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."⁷ Similarly, Article 25(1) of the American Convention on Human Rights says that:

Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the

⁴ Some of the materials in the paragraphs that follow are adapted and updated from Jon M. Van Dyke, *The Fundamental Human Right to Prosecution and Compensation*, 29 DENVER J. INT'L L. & POL'Y 77 (2001), and Jon M. Van Dyke, *The Fundamental Right of the Marcos Human Rights Victims to Compensation*, 76 PHILIPPINE L.J. 169 (2001). See also Jon M. Van Dyke and Gerald W. Berkley, *Redressing Human Rights Abuses*, 20 DENVER J. INT'L L. & POL'Y 243 (1992); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991); Raquel Aldana-Pindell, *In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes*, 35 VAND. J. TRANSNAT'L L. 1399 (2002); Raquel Aldana-Pindell, *An Emerging Universality of Justiciable Victims' Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes*, 26 HUMAN RIGHTS QUARTERLY 605 (2004).

⁵ Universal Declaration of Human Rights, *supra* note 1, at 73 (emphasis added).

⁶ International Covenant on Civil and Political Rights, *supra* note 2, at 53 (emphasis added).

⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 6, 312 U.N.T.S. 221 (1950). The European Court of Human Rights ruled in the Golder Case that the right to bring a civil claim to an independent judge "ranks as one of the universally 'recognised' fundamental principles of law." *Golder v. United Kingdom*, 18 Eur. Ct. H.R. 524, 535-36 ¶ 35 (1975). More recently, in *Mentes v. Turkey*, 59 Eur. Ct. H.R. 2689 (1997), *reprinted in* 37 I.L.M. 858, 882 (1998), the European Court of Human Rights ruled that Turkey violated the rights of citizens who were prevented from bringing a claim for the deliberate destruction of their houses and possession, noting that "the notion of an 'effective remedy' entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigative procedure."

constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.⁸

The Human Rights Committee in Geneva, established by the International Covenant on Civil and Political Rights, has emphasized the importance of bringing human rights abusers to justice by formally opposing amnesties:

The Committee has noted that some States have granted amnesty in respect of acts of torture. *Amnesties are generally incompatible with the duty of States to investigate such acts*; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future.⁹

The process of bringing a sense of closure and reconciliation typically requires four separate and distinct elements: (1) an apology for the wrong, (2) an investigation and accounting, (3)

⁸ American Convention on Human Rights, Nov. 22, 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, *entered into force* July 18, 1978. Decisions in the Inter-American system confirm that the right to an effective remedy is a continuing one that cannot be waived. The seminal case of the Inter-American Court of Human Rights is the Velasquez Rodriguez Case, Case No. 4, Inter-Am. C.H.R. (Ser. C) ¶ 174 (1988), *reprinted in* 28 I.L.M. 291 (1989), which holds that the American Convention on Human Rights imposes on each state party a “legal duty to . . . ensure the victim adequate compensation.” The court explained that each country has the duty to protect the human rights listed in the Convention and articulated this responsibility as follows:

This obligation implies the duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must *prevent, investigate and punish* any violation of the rights recognized by the Convention

Id. ¶ 166 (emphasis added). Other opinions that confirm this result include The “Street Children Case,” Villagran Morales v. Guatemala, Case No. 77, Inter-Am.C.H.R., OEA/Ser. C., ¶ 99 (2001) (confirming that the duty to prosecute and provide reparations are separate and distinct duties); Hermosilla v. Chile, Report No. 36/96, Case No. 10.843 Inter-Am. C.H.R. ¶¶ 68, 105, 112, OEA/Ser.L/V/II.95, doc. 7 rev. (1996) (ruling that Chile’s 1978 Amnesty Decree Law violated Article 25 of the American Convention on Human Rights because “the [human rights] victims and their families were deprived of their right to effective recourse against the violation of their rights”); Chanfeau Orayce and Others v. Chile, Report No. 25/98, Case Nos. 11.505 et al. Inter-Am. C.H.R. ¶ 86, OEA/ser.L/V/II.98, doc. 7 rev. (1997) (stating that Chile’s amnesty law violated Articles 1.1, 2, and 25 of the American Convention on Human Rights and that each country has a duty to “investigate the violations committed within its jurisdiction, identify those responsible and impose the pertinent sanctions on them, as well as ensure the adequate reparation of the consequences suffered by the victim”).

⁹ General Comment No. 20, art. 7, Human Rights Committee, 44th Sess., ¶ 15, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev. 1 (1994). *See also* Rodríguez v. Uruguay, Human Rights Committee, 51st Sess., Communication No. 322/1988, ¶ 12.4, U.N. Doc. CCPR/C/51/D/322/1988 (1994) (stating that “amnesties for gross violations of human rights . . . are incompatible with the obligations of the State party” under the International Covenant on Civil and Political Rights and that each country has a “responsibility to provide effective remedies to the victims of those abuses” to allow the victims to gain appropriate compensation for their injuries).

compensation for the victims, and (4) prosecution of the wrongdoers.¹⁰ Efforts to promote a consistent response to human rights violations have resulted in some progress, but it must be acknowledged that the international legal system is just now beginning the long process of developing effective mechanisms to bring wrongdoers to justice and to provide remedies for victims. The establishment of the International Criminal Court is certainly a promising development, but the refusal of the United States to participate in this new tribunal provides us with a dramatic reminder of how difficult this process will continue to be.

APOLOGY

The apology is a crucial underpinning for every process designed to bring closure to human rights abuses or other unresolved injury. For example, on March 12, 2000, Pope John Paul II issued a sweeping apology for the errors of the Roman Catholic Church during the previous 2,000 years.¹¹ By acknowledging "intolerance and injustice toward Jews, women, indigenous peoples, immigrants, the poor, and the unborn" this apology had the effect of clearing the air and establishing the basis for a new relationship with members of the injured groups.¹² In 1993, the United States Congress apologized for the participation by its military and diplomats in the illegal overthrow of the Kingdom of Hawai'i a hundred years earlier and set in motion a process of "reconciliation" designed to provide an appropriate settlement and heal the wounds.¹³ Both of these examples show that although an apology alone is not sufficient to right the wrongs inflicted, it is a necessary step toward resolving wrongs.

INVESTIGATION AND ACCOUNTING

Victims of human rights abuses have a strong need to understand what happened and to identify the wrongdoers. Based in part on the model set by the South African Truth and Reconciliation Commission,¹⁴ some twenty-three other countries

¹⁰ See generally Van Dyke, *The Fundamental Human Right to Prosecution and Compensation*, *supra* note 4, at 86-94.

¹¹ Alessandra Stanley, *Pope Asks Forgiveness for Errors of the Church Over 2,000 Years*, N.Y. TIMES, Mar. 13, 2000, at A1.

¹² *Id.*

¹³ Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, S.J. Res. 19, 103d Cong. (1993). See S. REP. NO. 108-85, at 1-2 (2003) (discussing "necessary elements of a process to provide for the reconciliation").

¹⁴ TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT (Truth & Reconciliation Comm'n. eds. 1999). This Commission met for two and a half years to

have set up commissions to provide some documentation for previous human rights abuses.¹⁵ Some have been more successful than others. In the Philippines, for instance, then-President Corazon Aquino gave broad power in 1986 to the seven-member Presidential Committee on Human Rights to investigate human rights violations attributed to the military during the 1972-1986 rule of President Ferdinand Marcos.¹⁶ Unfortunately, the committee never issued a final report.¹⁷

In Chile, after General Augusto Pinochet allowed elections to take place in the late 1980s while at the same time retaining firm control over the military and keeping a watchful eye on the new government, the new civilian President Patricio Aylwin appointed a Commission of Truth and Reconciliation.¹⁸ This Commission prepared a comprehensive report documenting 2,000 cases involving persons who had been murdered or who disappeared after arrest.¹⁹ Released in February 1991, the report described each case and provided the following composite statistics for the years of military rule beginning September 11, 1973 and ending March 11, 1990:²⁰

document as many of the human rights abuses as possible and issued a report blaming both sides for abuses. Persons who came forward with truthful accounts of their participation in violent acts linked to a political objective were pardoned as part of the national healing effort, but others have been prosecuted for their role in these atrocities. A challenge to the legitimacy of granting amnesties was rejected in *Azanian Peoples Org. v. President of the Republic of South Africa*, 1996 (4) SA 671 (CC). The court justified its conclusion by explaining that the amnesty was not “a uniform act of compulsory statutory amnesia,” but was appropriately linked to promoting “a constructive transition towards a democratic order . . . available only where there is a full disclosure of all facts” and only for acts committed “with a political objective.” *Id.* para. 32.

¹⁵ The countries that have set up some form of a truth and reconciliation commission include Argentina, Bolivia, Chad, Chile, East Timor, Ecuador, El Salvador, Germany, Ghana, Guatemala, Haiti, Nepal, Nigeria, Panama, Peru, Philippines, Serbia and Montenegro, Sierra Leone, South Africa, South Korea, Sri Lanka, Uganda, Uruguay, and Zimbabwe. See U.S. INST. FOR PEACE, TRUTH COMMISSION DIGITAL COLLECTION, available at <http://www.usip.org/library/truth.html> (last updated Feb. 22, 2005).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ This report is popularly known as the “Rettig Report” for former Senator Raul Rettig, president of the commission and is available at http://www.usip.org/library/tc/doc/reports/chile/chile_1993_toc.html [hereinafter *Rettig Report*]. See also Van Dyke & Berkley, *supra* note 4, at 249-51.

²⁰ See *Rettig Report*, *supra* note 19, at pt. 3, chs. 1-3.

Victims of Government Agents or Persons at their Service***1. Killed***

In war tribunals	59	2.8%
During protests	93	4.4%
During alleged escape attempts	101	4.8%
Other executions & deaths by torture	815	38.5%
TOTAL KILLED	1,068	50.5%

2. Disappeared after arrest 957 45.2%**Victims of Politically Motivated Private Citizens**

Killed	90	4.3%
SUB-TOTAL OF VICTIMS	2,115	100.0%

As the years went by, and as General Pinochet's power declined, the Chilean public demanded even further documentation, focusing in particular on those who had been tortured. A second effort was then undertaken to describe those cases. On November 29, 2004, the Chilean Presidential Commission issued a report detailing some 27,000 cases of torture in the 1973-1990 period.²¹ More than 18,000 of those cases took place in the four months after General Pinochet took power in September 1973, and another 5,266 individuals were tortured between January 1974 and August 1977.²² Like the relatives of those summarily executed or forced to disappear, the 27,000 torture victims will receive health, education, and housing benefits,²³ but their monthly pension was set at US\$190, substantially less than the amount that has been provided to the heirs of those murdered or who disappeared after arrest.²⁴

COMPENSATION THROUGH CIVIL LITIGATION

To address those many examples where countries have not been forthcoming to provide compensation to the victims of human rights abuses, some victims have brought claims in the courts of the United States against those who have violated their fundamental human rights. Such claims can be brought,

²¹ Human Rights Watch, *Chile: Government Discloses Torture Was State Policy*, Nov. 29, 2004, available at <http://www.hrw.org/english/docs/2004/11/29/chile9742.htm>.

²² *Id.*

²³ *Id.*

²⁴ *Id.* See also PRISCILLA .B. HAYNER, *UNSPEAKABLE TRUTHS* 317 (Routledge 2002) (2001) (discussing The Law Creating the National Corporation for Reparation and Reconciliation, Law No. 19,123, Chile, Jan. 31, 1992).

however, only if the wrongdoer comes into the United States and thus is subject to the personal jurisdiction of U.S. courts. In such situations, victims have utilized the Alien Tort Claims Act, which says: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."²⁵ In the case of *Sosa v. Alvarez-Machain*, the U.S. Supreme Court upheld the use of this statute in a six-to-three vote.²⁶ Referring to the traditionally-recognized offenses against diplomats, violations of safe conduct, and piracy, the Court explained that additional claims can be brought based on "present-day law of nations [if they] rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."²⁷ Justice Souter, writing for the majority, further explained that the Alien Tort Claims Act is a jurisdictional statute, but that Congress does not have to explicitly enact a cause of action statute before claims can be brought under it.²⁸

THE MARCOS HUMAN RIGHTS LITIGATION

Although most human rights victims have prevailed in their lawsuits for compensation, very few have actually collected because defendants are frequently either indigent or have disappeared after the case was filed.²⁹ One case where the possibility of victims' receiving actual compensation is promising is the protracted litigation by 9,531 victims of human rights abuses against Ferdinand E. Marcos and his Estate.³⁰ This class action was brought by those victims and/or their heirs who were tortured or murdered, or who disappeared after arrest, during the martial law regime in the Philippines from 1972 to 1986.

Ferdinand Marcos declared martial law on September 21, 1972 and proceeded to arrest (without judicial warrants) leading

²⁵ 28 U.S.C. § 1350 (2000).

²⁶ 124 U.S. 2739, 2755 (2004).

²⁷ *Id.* at 2761-62.

²⁸ *Id.*

²⁹ Exceptions to this general rule include the settlements reached in the cases of *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992) and *John Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *vacated and reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003), *district court opinion vacated by* 403 F.3d 708 (9th Cir. 2005).

³⁰ Among the many reported decisions in this litigation are: *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 910 F. Supp. 1460 (D. Haw. 1995); *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F. 2d 493 (9th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993); *In re Estate of Ferdinand Marcos Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994); and *Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 767 (9th Cir. 1996). The author is one of the attorneys who has been representing the Class of Human Rights Victims in these cases.

opposition figures as well as a wide variety of other dissidents.³¹ U.S. District Judge Manuel Real later explained that “Marcos gradually increased his own power to such an extent that there were no limits to his orders of the human rights violations suffered by plaintiffs in this action.”³² Marcos ruled the country by autocratic decree, issuing almost daily lists of individuals who were to be rounded up. Many of those detained were subject to “tactical interrogation,” the code phrase used to refer to the various torture techniques listed as follows:

Beatings while blindfolded by punching, kicking and hitting with the butts of rifles;

The “telephone” where a detainee’s ears were clapped simultaneously, producing a ringing sound in the head;

Insertion of bullets between the fingers of a detainee and squeezing the hand;

The “wet submarine,” where a detainee’s head was submerged in a toilet bowl full of excrement;

The “water cure,” where a cloth was placed over the detainee’s mouth and nose, and water poured over it producing a drowning sensation;

The “dry submarine,” where a plastic bag was placed over the detainee’s head producing suffocation;

Use of a detainee’s hands for putting out lighted cigarettes;

Use of flat-irons on the soles of a detainee’s feet;

Forcing a detainee while wet and naked to sit before an air conditioner often while sitting on a block of ice;

Injection of a clear substance into the body a detainee believed to be truth serum;

Stripping, sexually molesting and raping female detainees; one male plaintiff testified he was threatened with rape;

Electric shock where one electrode is attached to the genitals of males or the breast of females and another electrode to some other part of the body, usually a finger, and electrical energy produced from a military field telephone is sent through the body;

Russian roulette; and

³¹ Marcos signed Proclamation No. 1081 on September 21, 1972, placing the entire Philippines under martial law. *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 910 F. Supp. at 1462. He then issued General Order No. 1 proclaiming that he would “govern the nation and direct the operation of the entire Government, including all its agencies and instrumentalities” and General Orders 2 and 2-A, instructing the military to arrest without judicial warrant a long list of opposition leaders including Benigno Aquino, Jr., Jose Diokno, Chino Roces, Teodoro Locsin Sr., Soc Rodrigo, and Ramon Mitra. *Id.* at 1463; Joker P. Arroyo, *Do Pinoys Remember Martial Law?* PHILIPPINES DAILY INQUIRER, Sept. 21, 2000, reprinted in KILOBAYAN MAGAZINE, Oct. 2000, at 20.

³² *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 910 F. Supp. at 1463.

Solitary confinement while hand-cuffed or tied to a bed.³³

The lawsuit against Marcos was initially dismissed in 1986 by the U.S. District Court based on the act of state doctrine.³⁴ The U.S. Court of Appeals for the Ninth Circuit overturned this ruling in 1989, confirming that U.S. courts have a duty under international law to provide a forum for the claims of human rights victims.³⁵ In a related case involving torture in Argentina, this same court stated:

The crack of the whip, the clamp of the thumb screw, the crush of the iron maiden, and, in these more efficient modern times, the shock of the electric cattle prod are forms of torture that the international order will not tolerate. To subject a person to such horrors is to commit one of the most egregious violations of the personal security and dignity of a human being.³⁶

It is thus now clear that torture committed by governmental officials violates fundamental principles of international law. When the Marcos class action finally went to trial, the jury concluded that Ferdinand E. Marcos was personally responsible for human rights abuses and awarded the class of 9,531 plaintiffs (the Class of Human Rights Victims) \$1.2 billion in exemplary damages and \$766 million in compensatory damages.³⁷

³³ *Id.*

³⁴ The act of state doctrine is a prudential court-created doctrine used by U.S. courts to keep the judiciary out of controversial foreign policy issues. The doctrine prevents U.S. courts from questioning the legitimacy of official acts of foreign governments taken within their borders, but exceptions exist if the actions violate uncontroverted or treaty-based principles of international law. See, e.g., *Underhill v. Hernandez*, 168 U.S. 250 (1897); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). The Ninth Circuit ruled that the doctrine should not block the claims of the human rights victims because Marcos's acts of torture and murder were not "official acts," but were instead acts undertaken for his personal benefit, to maintain his hold on power and facilitate his efforts to steal assets from the Republic of the Philippines. *In re Estate of Ferdinand Marcos Human Rights Litig.*, 25 F.3d at 1471. See generally JORDAN J. PAUST, JOAN M. FITZPATRICK & JON M. VANDYKE, *INTERNATIONAL LAW AND LITIGATION IN THE U.S.* 707-12 (West 2000).

³⁵ *Hilao*, 878 F.2d 1438 (9th Cir.1989) (table decision).

³⁶ *Siderman de Blake*, 965 F.2d at 717.

³⁷ In May 1997, the human rights victims filed a complaint in the Makati regional trial court to make the U.S. judgment enforceable in the Philippines. See Mike Frialde, *Rights Victims Go After Marcos Estate*, PHILIPPINE STAR, May 21, 1997 (on file with author). The court said that the victims would have to file a bond of \$8.4 million to file their complaint in a Philippine court. *Id.* This ruling was appealed in 1999, and six years later, on April 12, 2005, the Philippine Supreme Court reversed the lower court judgment. *Mijares v. Javier Ranada*, G.R. No. 139325 (Philippines Supreme Court, April 12, 2005). The Court's decision relied on both Philippine and international law, and described the lower court's ruling as "legally infirm and unabashedly unjust." Slip op. at 3. The Court emphasized the "rules of comity, utility and convenience of nations" which "have established a usage among civilized states by which final judgments of foreign courts of competent jurisdiction are reciprocally respected and rendered efficacious under certain conditions that may vary in different countries." *Id.* at 12. "The preclusion of an action for enforcement of a foreign judgment in this country merely due to an exorbitant assessment of docket fees is alien to generally accepted practices and principles in international law." *Id.* at 31. In its conclusion, the Court emphasized that the U.S.

The Class of Human Rights Victims has spent the past decade in search of assets. One source was in Swiss banks. After extensive negotiation and litigation, the Swiss Federal Supreme Court ruled that deposits in Marcos' Swiss bank accounts amounting to some \$658 million should be transferred to the Philippines,³⁸ but attached several important conditions to this transfer. The Swiss Court stated explicitly in its ruling that the Philippine Government had (1) a responsibility to ensure that the human rights victims receive adequate compensation for their injuries and (2) a duty to keep the Swiss Government informed about the steps it took to provide compensation to the human rights victims.³⁹ The ruling also provided that the Swiss Government should monitor the situation to ensure that such compensation was forthcoming.⁴⁰

This ruling is particularly significant, because it was made in spite of the acknowledgment by the Swiss Court that the moneys in question had "illegal origins."⁴¹ The Court explained that both the Philippines and Switzerland had duties under international law to "safeguard[] human rights" and that this duty is "incumbent upon...the courts as executors of the international law regime."⁴² The Court recognized that all parties to the International Covenant on Civil and Political Rights⁴³ and the Convention Against Torture⁴⁴ have a duty to ensure that victims of human rights abuses can establish their right to compensation through competent judicial tribunals.⁴⁵

judgment "is not conclusive yet, but presumptive evidence of a right of the petitioners against the Marcos Estate. . . . [T]he Marcos Estate is not precluded to present evidence, if any, of want of jurisdiction, want of notice to the party, collusion, fraud, or clear mistake of law or fact." *Id.* at 33. "On the other hand, the speedy resolution of this claim by the trial court is encouraged, and contumacious delay of the decision on the merits will not be brooked by this Court." *Id.* at 33-34. In the course of its opinion, the Court referred to "the colossal damage wrought under the oppressive conditions of the martial law period. The cries of justice for the tortured, the murdered, and the *desaparacidos* arouse outrage and sympathy in the hearts of the fair minded. . . ." *Id.* at 2.

³⁸ Federal Office for Police Matters v. District Attorney's Office IV for the Canton of Zurich, 1A.87/1994/err (Swiss Federal Supreme Court, Dec. 10, 1997) [hereinafter *Canton of Zurich Case*]. See also Associated Press, *Swiss Court Approves Return of Marcos Funds*, N.Y. TIMES, June 16, 1998, at A13.

³⁹ *Canton of Zurich Case*, *supra* note 38.

⁴⁰ *Id.*

⁴¹ *Id.* ¶ 5(b).

⁴² *Id.* ¶ 7(c).

⁴³ International Covenant on Civil and Political Rights, *supra* note 2.

⁴⁴ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, U.N. GAOR, 39th Sess., 93d mtg., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984).

⁴⁵ *Canton of Zurich Case*, *supra* note 38, at ¶ 7(c)(aa), (cc). The Swiss Court also recognized that the Philippine judiciary has "shortcomings" and that it is "reputed to be ponderous and susceptible to corruption and political influence." *Id.* ¶ 7(c)(ee). For this reason, the Swiss Court included as a condition of transferring the money to the Philippines the requirement that the Philippine government "regularly update" the Swiss

The Philippine government has not fulfilled the conditions promulgated by the Swiss court. Instead, on July 15, 2003, the Philippine Supreme Court exacerbated the problem by ruling – in a case where the Human Rights Victims were excluded – that all these assets should go to the Philippine government.⁴⁶

More recently, a Merrill Lynch securities account valued at about \$35,000,000 has been identified, and after extensive discovery and trial, the District Court ruled in 2004 that these funds should be awarded to the Class of Human Rights Victims.⁴⁷ This matter is now on appeal before the U.S. Court of Appeals for the Ninth Circuit.

The position of the Philippine Government opposing the efforts of the human rights victims to collect their hard-earned judgment is hard to understand or accept. After the end of the Marcos era in 1986, the Philippine Government established the Presidential Commission on Good Government (PCGG) to pursue assets plundered by Marcos and his family.⁴⁸ Despite the establishment of PCGG, no affirmative steps have been taken to compensate the victims of human rights abuses during the Marcos Regime, even though, as discussed above, international law has recognized the unambiguous duty of a government to do so.⁴⁹ In 2004, the Class of Human Rights Victims filed a petition with the United Nations Human Rights Committee complaining

authorities on the procedures established “to compensate the victims of human rights violations under the Marcos regime.” *Id.* ¶ 7 (c)(hh).

⁴⁶ Republic of the Philippines v. Ferdinand E. Marcos, G.R. No. 152154 (S.Ct. 2003), available at http://www.lawphil.net/judjuris/juri2003/jul2003/gr_152154_2003.html.

⁴⁷ Merrill Lynch, Pierce, Fenner & Smith Inc. v. Arelma, Inc., No. CV00-595MLR (D.Haw. 2004). For a description of the holding, please see InterNet Bankruptcy Library, *Ferdinand Marcos: HI Court Orders \$40M To Be Paid To Victims*, CLASS ACTION REPORTER, July 14, 2004, available at http://bankrupt.com/CAR_Public/040714.mbx.

⁴⁸ President Corazon Aquino created the Presidential Commission on Good Government (PCGG) on February 28, 1986 in Executive Order No. 1, instructing this body to document and recover the moneys stolen by Ferdinand Marcos, his family, and his associates. See JOVITO R. SALONGA, PRESIDENTIAL PLUNDER: THE QUEST FOR THE MARCOS ILL-GOTTEN WEALTH (2000) (Senator Salonga was the first Chair of the PCGG).

⁴⁹ In 1988, the Philippine Legislature enacted the Comprehensive Agrarian Reform Law of 1988 which provides that “[a]ll receipts from assets recovered and from sales of ill-gotten wealth recovered through the Presidential Commission on Good Government” should be deposited in the Agrarian Reform Fund. Comprehensive Agrarian Reform Law of 1988, Republic Act No. 6657, ch. 14, § 63(b), available at <http://www.chanrobles.com/legal4agrarianlaw.htm> (last visited Mar. 1, 2005). In the Velasquez Rodriguez Case, for instance, the Inter-American Court of Human Rights explained that the duty to investigate human rights abuses and compensate the victims of these abuses continues despite “changes of government” even if the “the attitude of the new government may be much more respectful of those rights than that of the government in power when the violations occurred.” Velasquez Rodriguez Case, *supra* note 8, ¶ 184. It is, therefore, irrelevant whether the money from Switzerland in the escrow account is “ill-gotten wealth,” because the Philippine Government has a continuing duty to compensate the human rights victims, and this money provides an appropriate source for such compensation.

that the government of the Philippines has failed in its obligation to provide an effective remedy.⁵⁰

CRIMINAL PROSECUTIONS IN NATIONAL COURTS

The final element in bringing reconciliation and closure to human rights violations is the criminal prosecution of the wrongdoers, which can occur in a national or international court. An example of attempts to conduct national prosecutions can be found in Chile, after Pinochet's power ended, but the Chilean military has continued to vigorously oppose these efforts.⁵¹ Because of this opposition, the Chilean Supreme Court issued a resolution on January 27, 2005 requiring judges to conclude their investigations into abuses committed during Chile's military dictatorship within six months, which was viewed by many as a move that would cripple efforts to promote accountability for past human rights violations.⁵²

Another example of criminal prosecutions in national courts occurred in Germany after the reunification of East and West Germany. In November 1999, the appeals court in Leipzig, Germany upheld a manslaughter conviction against Egon Krenz, the last Communist leader of East Germany, and two other leading Politburo members, Gunther Kleiber and Gunther Schabowski, for their roles in the shootings of persons trying to escape to the West during the period when Germany was divided.⁵³

INTERNATIONAL CRIMINAL TRIBUNALS

Many countries have been unable to pursue prosecutions in their national courts because trials of former leaders are inevitably divisive and impose severe burdens on fragile governmental institutions. Some situations, therefore, seem to require international tribunals. A few efforts to prosecute war criminals occurred after World War I and in isolated situations in earlier eras, but the systematic trials of Germans and Japanese

⁵⁰ Complaint, *Pimentel v. Republic of the Philippines*, United Nations Human Rights Committee, September 2004 (on file with author). See also Rainier Allan Ronda, *RP, SC Charged Before U.N. Human Rights Body By Victims Of Marcos Era*, PHILIPPINE HEADLINE NEWS ONLINE, Oct. 16, 2004, at <http://www.newsflash.org/2004/02/hl/hl101161.htm>.

⁵¹ See AMNESTY INTERNATIONAL, *TRANSITION AT THE CROSSROADS: HUMAN RIGHTS VIOLATIONS UNDER PINOCHET RULE REMAIN THE CRUX* (1998), available at [http://web.amnesty.org/library/pdf/AMR220011996ENGLISH/\\$File/AMR2200196.pdf](http://web.amnesty.org/library/pdf/AMR220011996ENGLISH/$File/AMR2200196.pdf).

⁵² See Human Rights Watch, *Chile: Limits on Abuse Probes Close Door on Justice*, Jan. 27, 2005, available at <http://hrw.org/english/docs/2005/01/27/chile10084.htm>.

⁵³ Roger Cohen, *Verdict in Berlin Wall Deaths Is Upheld*, N.Y. TIMES, Nov. 9, 1999, at A10.

after World War II is usually thought of as the real beginning of the international criminal legal process.⁵⁴ The Nuremberg and Far Eastern Trials were established in order to document completely the atrocities committed by the German and Japanese.⁵⁵ Their purpose was to identify the specific individuals responsible for the policies that led to these atrocities, to punish those individuals, and to deter others who might be tempted to commit similar atrocities in the future.⁵⁶ The leaders of Germany and Japan, and those lower ranking individuals who committed war crimes, were prosecuted before judges from the Allied Powers.⁵⁷ Justice Robert Jackson, in order to bring a sense of legitimacy to the effort, took a leave from the United States Supreme Court to serve as chief U.S. prosecutor.⁵⁸ When he outlined the theory of these prosecutions, Justice Jackson made it clear that the principles utilized were universal and generalizable: “[W]e are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us.”⁵⁹ Some of the principles confirmed by the Nuremberg/Far East tribunals were that:

- * Individuals are responsible if they commit “a crime under international law.”⁶⁰

- * Heads of State do not have immunity from prosecution.⁶¹

- * The “defense of superior orders” will not relieve an individual of responsibility, “provided a moral choice was in fact possible to him.”⁶²

A. Recent Ad Hoc International Criminal Tribunals

After extensive post-World-War-II trials in Europe and Asia, no further international criminal trials were held anywhere until the 1990s, even though many international crimes were committed during those years. Because of the Cold War and the gridlock that the veto created in the U.N. Security Council, no agreement was possible on the need to bring any human rights abusers to justice after the closing of the Nuremberg/Far East

⁵⁴ See PAUST, FITZPATRICK & VAN DYKE, *supra* note 34, at 873-82.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, International Org. & Conf. ser. II, European & British Commonwealth 1, Dep’t of State Pub. No. 3080, at 330 (London 1945) [hereinafter *Jackson Statement*].

⁶⁰ See PAUST, FITZPATRICK & VAN DYKE, *supra* note 34, at 873-82.

⁶¹ *Id.*

⁶² *Id.*

tribunals. As discussed above, the world community made progress in identifying the fundamental human rights of each individual, but was not successful in creating effective mechanisms to protect these rights and punish wrongdoers.

1. The International Criminal Tribunals of Yugoslavia and Rwanda

After the Cold War ended, a series of tribunals were established beginning with the International Criminal Tribunal for the Former Yugoslavia in 1993 (Yugoslav Tribunal) and followed shortly by the International Criminal Tribunal for Rwanda in 1997 (Rwanda Tribunal).⁶³ Although the world community reacted much too slowly to the atrocities committed during the Yugoslav Civil War and the 1994 Rwanda genocide, the Security Council was able eventually to agree to establish these tribunals to bring to justice the main figures who were responsible for human rights abuses.⁶⁴

In the Yugoslav Tribunal, as of August 2004,

- * 82 individuals had been indicted
- * 20 remained at large
- * 56 were incarcerated (5 were on provisional release)
- * 2 had been discharged
- * 3 had been released
- * 1 had died
- * 47 cases remained active.⁶⁵

Illustrative of the Yugoslav Tribunal decisions are the

⁶³ For more information on the founding and history of these tribunals, visit their websites at <http://www.un.org/icty/> (Yugoslav Tribunal) and <http://www.ict.rw/> (Rwanda Tribunal).

⁶⁴ See Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, S.C. Res. 827, U.N. SCOR, 3217th mtg., U.N. Doc. S/RES/827 (1993); Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 3453d mtg., U.N. Doc. S/RES/955 (1994). See generally LOUIS HENKIN, GERALD L. NEUMAN, DIANE F. ORENTLICHER, & DAVID W. LEEBRON, HUMAN RIGHTS 618-30 (1999). The International Criminal Tribunal for Rwanda was established by the Security Council in November 1994 in response to the more than 800,000-1,000,000 minority ethnic Tutsi and Hutu opposition members who were killed during three months of slaughter in 1994 by the Hutu-dominated government. See generally *Rwanda: How the Genocide Happened*, BBC NEWS, Apr. 1, 2004, at <http://news.bbc.co.uk/1/hi/world/africa/1288230.stm>.

⁶⁵ See Eleventh Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, U.N. GAOR, 59th Sess., Annex I-III, Agenda Item 52, at 91-112, U.N. Doc. A/59/215 (2004) [hereinafter *Yugoslav Tribunal Report*].

conviction of Maj. Gen. Radislav Krstić of genocide for his directing of the 1995 Serbian attack on Srebrenica⁶⁶ and the conviction of Anto Furundžija, a twenty-nine-year-old Bosnian Croat, for aiding and abetting torture and rape while in command.⁶⁷ Krstić was sentenced to thirty-five years in prison and Furundžija was sentenced to a ten-year prison term.⁶⁸ The trial of the Serbian leader Slobodan Milošević has been going on for more than two years and is expected to continue for another two years.⁶⁹ Among those not yet apprehended are Radovan Karadžić and Ratko Mladić, the civilian and military leaders of the Bosnian Serbs.⁷⁰ In March 2005, General Rasim Delić, former head of the Muslim-dominated Bosnian army, and General Radivoj Miletić, of the Serbian forces, both surrendered to the International Tribunal for the Former Yugoslavia.⁷¹

In the Rwanda Tribunal, as of February 2005,

- * Judgments had been issued against 25 defendants
- * 5 were released
- * 20 were convicted (9 of which were on appeal)
- * Trials were ongoing regarding 26 others
- * 17 were in custody awaiting trial
- * 9 accused were still at large.⁷²

Perhaps the most prominent of the convictions was that of Jean Kambanda, the Prime Minister of Rwanda during the three months in 1994 when 800,000-1,000,000 people were killed.⁷³ While Prime Minister, Kambanda made speeches encouraging the killing of Tutsi, signed directives legalizing the militia, and facilitated the distribution of arms.⁷⁴ He pled guilty to six counts of genocide and crimes against humanity and was sentenced to

⁶⁶ Krstić was found to have directed the attack in which 7,000 Bosnian Muslim men were marched off to their deaths. *Id.* at 61-62.

⁶⁷ Furundžija was found to have stood by in 1993 while a subordinate repeatedly raped at knifepoint a naked Muslim woman during interrogation. *See Bosnian War Criminal Loses Appeal*, BBC NEWS, July 21, 2000, at <http://news.bbc.co.uk/1/hi/world/europe/844377.stm>.

⁶⁸ *Yugoslav Tribunal Report*, *supra* note 65, at 62; *Bosnian War Criminal Loses Appeal*, *supra* note 67.

⁶⁹ For more information on the ongoing Milošević trial, see the Milošević Trial Public Archive, <http://hague.bard.edu/> (last visited Mar. 1, 2005).

⁷⁰ *Yugoslav Tribunal Report*, *supra* note 65, at 112.

⁷¹ *See 2 Bosnian Generals Surrender To UN Court*, THE TORONTO SUN, Mar. 1, 2005, at 28.

⁷² *See The Tribunal at a Glance*, available at <http://www.ictt.org/ENGLISH/factsheets/1.htm> (last visited Mar. 1, 2005).

⁷³ *Id.*

⁷⁴ *See Bill Berkeley, Judgment Day*, THE WASHINGTON POST, Oct. 11, 1998, at W10.

life imprisonment.⁷⁵

The investigations conducted by the Yugoslavia and Rwanda Tribunals came to an end as of December 31, 2004.⁷⁶ All trials in the Tribunals must be completed by 2008, and all appeals completed by 2010.⁷⁷ Cases that cannot be completed by then must be transferred to local courts.

2. The Special Court for War Crimes in Sierra Leone

The Special Court for War Crimes in Sierra Leone differs from the Yugoslav and Rwanda Tribunals in that it has both international and local judges.⁷⁸ As of February 2005, eleven persons associated with all three of the country's former warring factions had been indicted by the Special Court.⁷⁹ They were charged with war crimes and crimes against humanity, based on murder, rape, extermination, acts of terror, enslavement, looting and burning, sexual slavery, conscription of children into an armed force, and attacks on UN peacekeepers and humanitarian workers.⁸⁰ A significant decision was issued by the Appeals Chamber of the Special Court on May 31, 2004 ruling that recruitment of child soldiers is a crime and a violation of international law.⁸¹

3. The Special Panel for Serious Crimes-East Timor

East Timor was granted its independence from Indonesia in 1999, after which Indonesian militias killed about 1,400 people, mainly independence supporters.⁸² The militias also tortured

⁷⁵ *Id.*

⁷⁶ International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda, S.C. Res. 1503, U.N. SCOR, 4817th mtg., U.N. Doc. S/RES/1503 (2003) (affirming ICTY Completion Strategy).

⁷⁷ *Id.*

⁷⁸ See The Special Court for Sierra Leone, at <http://www.sc-sl.org> (last visited Mar. 1, 2005); Global Policy Forum, *Special Court for Sierra Leone*, at <http://www.globalpolicy.org/intljustice/sierraindx.htm> (last visited Mar. 1, 2005). See also Human Rights Watch, *Bringing Justice: The Special Court for Sierra Leone*, Sept. 2004, available at <http://www.globalpolicy.org/intljustice/tribunals/sierra/2004/0904sierra.pdf>. For background on the atrocities committed during the Sierra Leone civil war see Van Dyke, *The Fundamental Human Right to Prosecution and Compensation*, *supra* note 4, at 77-81 (2001).

⁷⁹ Of these eleven individuals, three were alleged leaders of the former Civil Defense Forces, five were alleged leaders of the former Revolutionary United Front, and the final three were alleged leaders of the former Armed Forces Revolutionary Council. The Special Court for Sierra Leone, at <http://www.sc-sl.org> (last visited Mar. 1, 2005).

⁸⁰ *Id.*

⁸¹ Prosecutor v. Norman, 43 I.L.M. 1129 (Appeals Chamber of the Special Ct. for Sierra Leone 2004) (unpublished report to the United Nations), available at <http://www.sc-sl.org/CDF-decisions.html>.

⁸² James Dunn, *Crimes Against Humanity in East Timor, January to October 1999: Their Nature and Causes*, Feb. 14, 2001, para. 28, available at http://www.etan.org/news/2001a/dunn1.htm#_Toc512331035.

and raped an unknown number of people.⁸³ More than a quarter of a million people, or some thirty percent of East Timor's population, were forcibly deported or fled across the border to West Timor in Indonesia.⁸⁴ The United Nations coordinated with local courts to support and staff two Special Panel for Serious Crimes.⁸⁵ This process led to the conviction of seventy-five persons for their involvement in the events of 1999, with two acquittals and two indictment dismissals.⁸⁶

This Special Panels was in the process of closing down in early 2005, after the final trial of Apresio Guterres was completed.⁸⁷ Indonesian courts in Jakarta have also prosecuted some of the military leaders connected with the East Timor massacres.⁸⁸ As of early 2005, eighteen people had been prosecuted in Indonesia in an *ad hoc* Indonesian Human Rights Court, but none are currently in jail as their cases are being appealed⁸⁹

4. The Cambodian Tribunal

During the Cambodian genocide of 1975-79, some 1.7 million people lost their lives, constituting twenty-one percent of the country's population.⁹⁰ The Khmer Rouge regime headed by Pol Pot combined extremist ideology with ethnic animosity and a diabolical disregard for human life to produce repression, misery, and murder on a massive scale. In late 2004, after six years of deliberation, the Cambodian National Assembly finally ratified an agreement with the United Nations to establish a tribunal utilizing both international and national judges to try the Khmer Rouge leaders.⁹¹ As of May 2005, this tribunal was still awaiting funding from international donors to allow it to function properly.⁹² Secretary General Kofi Annan, in his report to the

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ See Human Rights Watch, *Human Rights Overview: East Timor*, at <http://hrw.org/english/docs/2005/01/13/eastti9825.htm> (last visited Mar. 1, 2005).

⁸⁶ David Lyon, *Justice for Timor War Criminals?* BBC NEWS, Feb. 18, 2005, at <http://news.bbc.co.uk/2/hi/asia-pacific/4277601.stm>.

⁸⁷ *Id.* See generally Justice Initiative and the Coalition for International Justice, *Unfulfilled Promises: Achieving Justice for Crimes Against Humanity in East Timor*, Nov. 24, 2004, available at http://www.justiceinitiative.org/db/resource2?res_id=102368.

⁸⁸ David Lyon, *supra* note 86.

⁸⁹ *Id.*

⁹⁰ U.S. Bureau of East Asian and Pacific Affairs, *Background Note: Cambodia*, April 2005, available at <http://www.state.gov/r/pa/ei/bgn/2732.htm>.

⁹¹ See Ed Cropley, *UN, Cambodia Sign Deal on Khmer Rouge Trial*, REUTERS, June 6, 2003, available at http://www.globalpolicy.org/intljustice/tribunals/cambodia/2003/0606_agreement.htm. See also Situation on Human Rights in Cambodia, G.A. Res. 191, U.N. GAOR, 58th Sess., Agenda Item 117, U.N. Doc. A/RES/58/191 (2003).

⁹² See Press Release, Pledging Conference for UN Assistance to Khmer Rouge Trials, *Governments Pledge \$38.48 Million for Khmer Rouge Trials in Cambodia* (Mar. 28, 2005).

General Assembly, said Cambodia must have the funds for the tribunal's first year of operations and pledges for another two years in hand before the trials can begin.⁹³

THE INTERNATIONAL CRIMINAL COURT

Although *ad hoc* criminal tribunals have been important in prosecuting and punishing wrongdoers, the process of developing a new court for every situation has been time-consuming, expensive, and exhausting for the world community. Both the lessons learned from these efforts and the frustrations involved in each separate situation led many governments to decide that the time had come to develop a permanent International Criminal Court (ICC). The treaty establishing the ICC was drafted in Rome during the summer of 1998,⁹⁴ and the Court came into being on July 1, 2002, after the sixtieth country ratified the treaty. As of April 2005, ninety-eight countries had ratified and one hundred and thirty nine countries had signed the Rome Treaty.⁹⁵ Of these, twenty-six were from Western Europe, fifteen were from Eastern Europe, nineteen were from Latin America and the Caribbean, twenty-six were from Africa, and eleven were from Asia.⁹⁶

In February 2003, the contracting nations elected seven females and eleven males representing the geographical variety of the global community to serve as the initial judges on the court.⁹⁷ The ICC has jurisdiction over crimes against humanity, genocide, war crimes, and will have jurisdiction over crimes of "aggression" when the contracting parties are able to define that

(stating how pledge left the "Extraordinary Chambers for the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, \$4.52 million short of the goal of \$43 million").

⁹³ Report of the Secretary-General on Khmer Rouge Trials, U.N. GAOR, 59th Sess., Agenda Item 105, at 4, U.N. Doc. A/59/432 (2004).

⁹⁴ Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9, 37 I.L.M. 999 [hereinafter *Rome Statute*].

⁹⁵ See Ratification Status of the Rome Statute, available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp> (last visited Mar. 1, 2005).

⁹⁶ *Id.* This includes *every nation in Western Europe* except a couple of the mini-states. *Id.*

⁹⁷ These judges and their respective nations are: Maureen Harding Clark (Ireland); Fatoumata Dembele Diarra (Mali); Sir Adrian Fulford (United Kingdom); Karl T. Hudson-Phillips (Trinidad and Tobago); Claude Jorda (France); Elizabeth Odio Benito (Costa Rica); Gheorghios M. Pikis (Cyprus); Tuiloma Neroni Slade (Samoa); Sang-Hyun Song (Republic of Korea); Sylvia Steiner (Brazil); René Blattmann (Bolivia); Hans-Peter Kaul (Germany); Philippe Kirsch (Canada); Erkki Kourula (Finland); Akua Kuenyehia (Ghana); Navanethem Pillay (South Africa); Mauro Politi (Italy); and Anita Ušacka (Latvia). For biographical information on each of the judges, see <http://www.icc-cpi.int/chambers/judges.html> (last visited May 1, 2005).

term at a forthcoming meeting.⁹⁸ In short, the ICC has jurisdiction in situations where national courts are unable or unwilling to prosecute crimes. Cases can be brought to the Court by the United Nations Security Council (acting under Chapter VII of the UN Charter), or by a contracting party, or by the Court's Prosecutor, if such a proceeding is approved by the Court's "Pre-Trial Chamber."⁹⁹

The United States participated in the 1998 drafting session that produced the ICC, but it started to express doubts about the ICC almost immediately after the ink was dry on the 1998 treaty.¹⁰⁰ During the Clinton Administration, David Scheffer, the U.S. Ambassador at Large for War Crimes Issues, led the U.S. effort to thwart the emergence of the ICC. He expressed the concern that the ICC would have jurisdiction over nationals of countries that have not ratified the treaty if they commit the designated crimes in a country that has ratified the treaty.¹⁰¹ The Clinton Administration was apparently comfortable with the listing of war crimes and their elements, but was concerned that a political agenda (*i.e.*, the Middle East peace process) could lead to prosecutions when an occupying power transfers its population into the territory it occupies.¹⁰² Concerns were also expressed that the threat of prosecutions for committing the crime of aggression, once defined, might interfere with the ability of the international community to respond to humanitarian and other crises.¹⁰³

Another situation the United States has been concerned about involves an atrocity committed by a U.S. soldier on a peacekeeping mission in a country that has accepted the jurisdiction of the ICC.¹⁰⁴ The United States would have the responsibility to prosecute the soldier under applicable treaties

⁹⁸ *Rome Statute*, *supra* note 94, art. 5.

⁹⁹ U.N. Charter arts. 39-51; *Rome Statute*, *supra* note 94, arts. 14-15.

¹⁰⁰ See David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 14 (1999).

¹⁰¹ *Id.* at 19. See, e.g., David Scheffer, Evolution of U.S. Policy Toward the International Criminal Court, Address at American University (September 14, 2000), available at <http://www.state.gov/documents/organization/7095.doc>; David Scheffer, On-The-Record Briefing at the Foreign Press Center (July 31, 1998), available at http://www.amicc.org/docs/Scheffer7_31_98.pdf; Statement By David Scheffer U.S. Ambassador at Large for War Crimes Issues and Head of the U.S. Delegation to the U.N. Diplomatic Conference on the Establishment of an International Criminal Court (July 15, 1998), available at http://www.amicc.org/docs/Scheffer7_15_98.pdf.

¹⁰² See generally Scheffer, *supra* note 101, at 19.

¹⁰³ *Id.* at 17-20. See also David J. Scheffer, Statement in the Sixth Committee of the General Assembly on the International Criminal Court (Oct. 21, 1998), U.S. Mission to the United Nations Press Release No. 179 (98), available at http://www.un.int/usa/98_179.htm.

¹⁰⁴ *Id.*

and U.S. statutes, but if the United States failed to exercise jurisdiction, the country in which the atrocity took place could prosecute. Could this host country transfer its jurisdiction over the violation to the ICC? Ambassador Scheffer argued vigorously that such jurisdiction could not be delegated, quoting Duke Law Professor Madeline Morris for the proposition that “territorial jurisdiction is not ‘a form of negotiable instrument.’”¹⁰⁵

President Clinton finally signed the Rome Treaty creating the ICC at the very end of his Administration, but the Bush Administration revoked this signature within a few months.¹⁰⁶ Since then, President Bush has denounced the ICC on a number of occasions, and spoke proudly of his decision in his second debate with John Kerry on October 8, 2004:

I made a decision not to join the International Criminal Court in The Hague, which is where our troops could be brought to—brought in front of a judge, an unaccounted judge.

I don't think we ought to join that. That [decision] was unpopular.

....

You don't want to join the International Criminal Court just because it's popular in certain capitals in Europe.”¹⁰⁷

Although the United States has been trying to generate a lot of smoke to explain its reservations about the ICC, many cannot understand why our country is not able to embrace enthusiastically this important international initiative and work with other enlightened countries to make it work effectively. The advantages of having such an institution in place to ensure effective prosecution of those committing atrocities surely outweighs the highly-technical and mostly-unlikely scenarios developed by Ambassador Scheffer. In any event, the Court is now operational, and as of April 2005 it had been authorized to investigate cases from the Central African Republic, Democratic

¹⁰⁵ See David Scheffer, *International Criminal Court: The Challenge of Jurisdiction*, Address at the Annual Meeting of the American Society of International Law (March 26, 1999), available at <http://www.state.gov/documents/organization/6552.doc>. Ambassador Scheffer offered in horror the hypothetical that the country where the atrocity took place might transfer jurisdiction to Libya (in exchange for Libya's transferring jurisdiction over a national of the country where the atrocity occurred). *Id.* Although it is always possible to come up with blood-curdling hypotheticals, it seems disingenuous and is ultimately unconvincing to compare the exercise of jurisdiction by the carefully-constructed and internationally-recognized International Criminal Court with that of an international pariah like Libya.

¹⁰⁶ See United Nations Assoc. in Canada, *U.S. Revokes Obligations to International Criminal Court*, May 8, 2002, available at http://www.unac.org/en/news_events/statements/usicc.asp.

¹⁰⁷ The transcript for the October 8, 2004 Presidential Debate between President George W. Bush and U.S. Senator John F. Kerry (MA) can be found at <http://www.debates.org/pages/trans2004c.html>.

Republic of Congo, the Ivory Coast, and the Republic of Uganda.¹⁰⁸

A. The ICC and Darfur

The question of how to deal with war crimes committed during the crisis in Darfur became a defining moment for the ICC. Indiscriminate attacks by government forces and militias, including the killing, torture, rape, and forced disappearances of civilians, the destruction and pillaging of villages, and other forms of forced displacement, have produced 300,000 deaths and 2,000,000 homeless African villagers.¹⁰⁹ A UN commission released a report in early 2005 identifying and explaining the evidence against fifty-one suspects (including members of the Sudan government).¹¹⁰ Louise Arbour, the UN High Commissioner for Human Rights, emphasized on February 15, 2005 that this issue must be referred to the ICC, explaining that “[t]here is no hope for sustainable peace in Darfur without immediate access to justice.”¹¹¹ UN Secretary-General Kofi Annan supported this view, saying that “[i]t is vital that these crimes are not left unpunished.”¹¹² The United States took a different view, because of its general opposition to the ICC, and advocated that a new *ad hoc* international court be established in Arusha, Tanzania, where the Rwanda Tribunal has been meeting, to prosecute those accused of atrocities in Darfur.¹¹³ China and Algeria took a third view, opposing international adjudication, and arguing that Sudan’s own courts should try those who have been implicated.¹¹⁴

Because of the united European view favoring the referral of these cases to the ICC, the United States finally abandoned its opposition on March 31, 2005 and agreed not to veto the Security

¹⁰⁸ The Uganda referral stemmed from the civil war in northern Uganda that has led to 100,000 dead and 1,500,000 refugees. In February 2005, a spokesperson for the Court announced that arrests warrants would issue shortly for up to a dozen suspects, the first arrest warrants issued by the Court. See The Hague, *President of Uganda Refers Situation Concerning the Lord’s Resistance Army (LRA) to the ICC*, Jan. 29, 2004, available at http://www.icc-cpi.int/pressrelease_details&id=16&l=en.html; Human Rights Watch, *Human Rights Overview: Uganda*, at <http://hrw.org/english/docs/2005/01/13/uganda9862.htm> (last visited Mar. 1, 2005).

¹⁰⁹ See Human Rights Watch, *Human Rights Overview: Sudan*, at <http://hrw.org/english/docs/2005/01/13/sudan9885.htm> (last visited Mar. 1, 2005).

¹¹⁰ See Report of the Secretary-General on the Sudan, U.N. SCOR, U.N. Doc. S/2005/68 (2005).

¹¹¹ Warren Hoge, *Human Rights Chief Urges U.N. to Act Quickly on Sudan*, N.Y. TIMES, Feb. 17, 2005, at A9.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

Council's referral of the Darfur crimes.¹¹⁵ The Council's vote was 11-0, with Algeria, Brazil, China, and the United States abstaining.¹¹⁶ The United States was persuaded to abstain after it received assurances that any U.S. citizens accused of war crimes in the Sudan would not be handed over to the ICC or to any non-U.S. court.¹¹⁷ The Acting U.S. Ambassador to the United Nations, Anne Patterson, reiterated that the United States still "fundamentally objects" to the Court, but was going along with the referral because "[i]t is important that the international community speak with one voice in order to help promote effective accountability."¹¹⁸

B. Saddam Hussein

Other current unresolved matters include the prosecution of Saddam Hussein and those liable for the abuse of the detainees incarcerated during the Afghanistan and Iraqi conflicts. Hussein has been held since his capture in December 2003, and has made one appearance in an Iraqi court.¹¹⁹ It remains unclear, however, whether the Iraqi judicial system is capable of trying him. Interim Prime Minister Iyad Allawi has said that Hussein has committed crimes against humanity, explaining that "[m]ore than a million Iraqis are missing as a result of events that occurred during the former regime" and "[h]undreds of thousands of Iraqis of all religions and ethnic groups are believed to be buried in mass graves."¹²⁰ In addition, a number of lower-ranking soldiers have been prosecuted in U.S. and British military courts for the abuses imposed on incarcerated Iraqis, but no one in a position of authority has been charged and no independent investigation has been conducted regarding these widespread abuses.¹²¹

¹¹⁵ Associated Press, *U.S. Agrees to Use U.N. Court for Darfur Cases*, L.A. TIMES, March 31, 2005, at A10.

¹¹⁶ Associated Press, *U.N. Votes for Court to Try Sudan Cases*, L.A. TIMES, April 1, 2005, at A7.

¹¹⁷ Hoge, *supra* note 111.

¹¹⁸ *Sudan War Suspects Now to Face ICC*, CNN NEWS, April 1, 2005, at <http://edition.cnn.com/2005/WORLD/africa/03/31/un.sudan.reut/>.

¹¹⁹ *Defiant Saddam Appears in Court*, BBC NEWS, July 1, 2004, at http://news.bbc.co.uk/1/hi/world/middle_east/3855359.stm.

¹²⁰ John F. Burns, *Iraq Will Charge Hussein In Court Along With Aides*, N.Y. TIMES, June 30, 2004, at A1.

¹²¹ See, e.g., Associated Press, *3 British Soldiers Sentenced for Abusing Iraqis*, N.Y. TIMES, Feb. 26, 2005, at A7; Kate Zernike, *U.S. Soldier Found Guilty in Iraq Prison Abuse Case*, N.Y. TIMES, Jan. 15, 2005, at A1.

C. Abuses of Detainees in Iraq, Afghanistan, Guantanamo Bay, and Elsewhere

As this article is being prepared for publication, an increasing number of reports continue to surface regarding a wide range of abuses suffered by those held at the U.S. Naval Base at Guantanamo Bay, Cuba, and in prisons in Iraq and Afghanistan. A few low-ranking soldiers have been prosecuted for the widely-photographed abuses at the Abu Ghraib prison, but no U.S. official has been held accountable for what seems to be a systematic use of torture to obtain information.¹²² To date, no independent investigation into the use of torture by the United States has been conducted.

To give just one of a number of possible examples, the United States has acknowledged utilizing the practice of “water-boarding,” which involves strapping detainees to boards and immersing them in water to make them think they are drowning.¹²³ This activity is clearly an example of “torture” that violates the Torture Convention, but no one has been charged or prosecuted for authorizing or conducting this practice. U.S. officials have also permitted its armed forces to use dogs to terrify detainees, to place detainees in painful positions for protracted periods of time so that they would talk, to increase or decrease the room temperature dramatically, to use nauseating smells, and to disrupt normal sleep patterns.¹²⁴ These atrocities will continue to haunt the efforts of the coalition forces until a full and fair independent investigation is conducted and those who authorized or allowed them to occur are brought to justice. As one commentator explained in March 2005:

The Bush administration is desperately trying to keep the full story from emerging. But there is no longer any doubt that prisoners seized by the U.S. in Iraq, Afghanistan and elsewhere have been killed, tortured, sexually humiliated and otherwise grotesquely abused.

....

... If you pay close attention to what is already known about the sadistic and barbaric treatment of prisoners by the U.S., you can begin to wonder how far we’ve come from the Middle Ages.¹²⁵

¹²² See, e.g., Douglas Jehl, *White House Has Tightly Restricted Oversight of C.I.A. Detentions, Officials Say*, NY TIMES, at A21; Douglas Jehl, *Pentagon Will Not Try 17 G.I.’s Implicated in Prisoners’ Deaths*, NY TIMES, Mar. 26, 2005, at A4; Zernike, *supra* note 121.

¹²³ Douglas Jehl & David Johnston, *C.I.A. Expands Its Inquiry Into Interrogation Tactics*, NY TIMES, Aug. 29, 2004, at 10.

¹²⁴ *Harsh Tactics Were Allowed, General Told Jailers in Iraq*, N.Y. TIMES, March 29, 2005, at A8 (quoting from a memorandum signed by Lt. General Ricardo Sanchez, then senior commander in Iraq, on Sept. 14, 2003).

¹²⁵ Bob Herbert, *Is No One Accountable?* N.Y. TIMES, March 28, 2005, at A17.

CONCLUSION

Over the last century, the world has made substantial progress in identifying the fundamental norms of human rights that are accepted by all nations and peoples across the globe. Despite this progress, we have a long way to go towards building effective mechanisms to ensure that these norms are respected by all nations and peoples. "Unfortunately, most state-sponsored gross human rights violations are never investigated, or, if investigated, are subject to grave omissions or irregularities, including the corruption of evidence."¹²⁶ In order to ensure that human rights abuses around the globe are stopped, the international community must come together and agree on how violators will be identified and prosecuted for their crimes. Once that agreement is made, the international community must abide by that agreement and work collectively to prosecute and punish individuals for their crimes against humanity.

As Professor Ved Nanda explained simply and eloquently in 1983, writing in the Rocky Mountain News, "What we're saying is there are international standards nations must obey. If you tolerate violations of human rights anywhere, you encourage it everywhere."¹²⁷ To stop human rights violations, a cohesive agreement amongst nations is necessary. To date, the United States has fallen short of its responsibility and has not stayed true to Justice Robert Jackson's statement at Nuremberg that if certain acts are crimes, "they are crimes whether the United States does them or whether Germany does them, and we are not prepared to lay down a rule of criminal conduct against others which we would be unwilling to have invoked against us."¹²⁸ As another commentator states: "Lawlessness should never be an option for the United States. Once the rule of law has been extinguished, you're left with an environment in which moral degeneracy can flourish and a great nation can lose its soul."¹²⁹ Unquestionably, a decision by the United States to become a contracting party to the International Criminal Court would be a major step in the direction of promoting universal adherence to universal human rights norms.

¹²⁶ Aldana-Pindell, *Emerging Universality*, *supra* note 4, at 608.

¹²⁷ Ved Nanda, ROCKY MOUNTAIN NEWS, 1983 (on file with author).

¹²⁸ *Jackson Statement*, *supra* note 59.

¹²⁹ Herbert, *supra* note 125.